

SUPREME COURT OF QUEENSLAND

CITATION: *Craber v WorkCover Queensland* [2013] QCA 304

PARTIES: **CRABER, Scott Thomas**
(applicant)
v
WORKCOVER QUEENSLAND
(respondent)

FILE NO/S: CA No 187 of 2013
DC No 93 of 2010

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 11 October 2013

DELIVERED AT: Brisbane

HEARING DATE: 19 September 2013

JUDGES: Fraser and Morrison JJA and Philippides J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for leave to adduce further evidence is refused.**
2. The application for an extension of time is refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where applicant was convicted of one count of fraud, pursuant to s 533 of the *Workers’ Compensation and Rehabilitation Act 2003* (Qld), in the Magistrates Court – where the District Court refused an application to extend time to appeal to it – whether an application for an extension of time, to appeal from the District Court, should be granted

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the applicant sought to adduce new evidence in the form of a document – where this document had been created a year after the relevant event – whether application for leave to adduce further evidence should be granted

Penalties and Sentences Act 1992 (Qld), s 32
Workers’ Compensation and Rehabilitation Act 2003 (Qld), s 533

R v Banhelyi [2011] QCA 268, cited
R v Lewis (2006) 163 A Crim R 169; [2006] QCA 121, cited
R v Mizzi [2012] QCA 252, cited
R v Nuttall [2013] QCA 219, cited
R v Smithers [2013] QCA 90, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited

COUNSEL: The applicant appeared on his own behalf
S Sapsford for the respondent

SOLICITORS: The applicant appeared on his own behalf
McInnes Wilson Lawyers for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.
- [2] **MORRISON JA:** This is an application by Scott Thomas Craber for an extension of time in which to appeal from a decision of the District Court which, itself, refused an application to extend time to appeal to it from the applicant's conviction in the Magistrates Court.
- [3] On 11 February 2009, the applicant was convicted on one count of fraud pursuant to s 533 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld). The offence concerned the failure of the applicant to notify WorkCover of his employment and earnings as a bus driver during the period when he was in receipt of compensation. The applicant pleaded not guilty and was represented by a solicitor at the hearing of the prosecution.

Trial before the Magistrate

- [4] Before the learned Magistrate the applicant's main point was that he had, in fact, disclosed to a representative of WorkCover (a Mr Montaldi) the fact that he was in employment as a bus driver. The contention was that on a particular date the applicant had attended at WorkCover and given Mr Montaldi a copy of his payslip.¹ That fact was denied by Mr Montaldi who gave evidence that if the applicant had given him such a payslip, Mr Montaldi would have terminated his compensation.
- [5] The learned Magistrate, in the course of thorough reasons, rejected the evidence of the applicant, and preferred the evidence of Mr Montaldi. He also observed that one reason for his preference of Mr Montaldi's evidence was that the alleged payslip had not been produced.²
- [6] On 11 February 2009 the applicant was sentenced as follows:
- (a) pursuant to s 32 of the *Penalties and Sentences Act 1992* (Qld), that the applicant enter into a recognisance in the sum of \$3,000 on the condition that he keep the peace and be of good behaviour for a period of 12 months;

¹ Transcript of Proceedings (*Q-Comp v Scott Thomas Craber*, Industrial Magistrates Court, Industrial Magistrate Black, Cairns, 09 February 2009) at 1-31 ("MC Transcript").

² The applicant's evidence was that the original had been produced, and then photocopied by Mr Montaldi.

- (b) payment of restitution in the sum of \$8,569.83;
- (c) payment of costs of court in the sum of \$68.60; and
- (d) payment of professional costs fixed in the sum of \$14,329.50.³

A conviction was not recorded.

Appeal to the District Court

- [7] The applicant then lodged a notice of appeal on 20 April 2010, about 14 months after he had been convicted. Given that the time for filing a notice of appeal was one month, the notice of appeal was considerably out of time.
- [8] The applicant had to apply for an extension of time to bring the appeal. When questioned by the learned primary judge, the applicant gave a series of explanations as to the delay, including:
- (a) that he had been to see Legal Aid, who had told him that could not get any funding until he was allowed to proceed with the appeal;⁴
 - (b) he had been overseas for six months in 2009, from May to November;⁵
 - (c) when he returned from overseas he could not get solicitors because he did not have any money;⁶ and
 - (d) he was unaware of his legal rights and his solicitors did not tell him that he only had a month to file an appeal.⁷
- [9] The applicant told the learned primary judge that he had asked his solicitors to lodge an appeal “but they said they had – didn’t have any evidence to make any appeal grounds”.⁸ He went on to confirm that his lawyers had told him that he did not have any grounds “[b]ecause there was no new evidence”.⁹ Accordingly, as he explained to the learned primary judge, his impetus then for lodging the appeal was that he obtained what he referred to as new evidence.¹⁰
- [10] The applicant sought to adduce this new evidence before the learned primary judge and was permitted to do so. That included an allegation of a threat made to him by Mr Montaldi as he was leaving the court and a doctor’s certificate (dated prior to the offence) certifying that he was fit to drive a manual vehicle.¹¹
- [11] The learned primary judge explored in argument the various ways in which the applicant contended that the trial before the Magistrate had miscarried. That

³ Verdict and Judgment Record, dated 10 April 2013.

⁴ Transcript of Proceedings (*Scott Thomas Craber v Workcover Queensland*, District Court, Appellate Jurisdiction, Judge Harrison, 21 May 2010) 1-3 (“DC Transcript”).

⁵ It transpired that the six months absence overseas was because the applicant was getting married in the Philippines: DC Transcript at 1-18.

⁶ DC Transcript at 1-3.

⁷ DC Transcript at 1-4.

⁸ DC Transcript at 1-10.

⁹ DC Transcript at 1-10.

¹⁰ Judgment of Harrison DCJ at 3.

¹¹ DC Transcript 1-11(doctor’s certificate) and 1-13 (threat).

included allegations of file notes and other documents missing from the WorkCover file, and the alleged threats from Mr Montaldi.

- [12] The learned primary judge concluded that the new evidence would not assist on any appeal against the decision of the Magistrate, and that it was not an appropriate case to exercise discretion to allow an extension of time to appeal, stating:

“Firstly, I must have regard to the period of time that elapsed, and 14 months is a very lengthy period. Secondly, the application is based around new evidence, but I have analysed that evidence in my reasons and it seems to me that there is nothing in the material which it is proposed to put which could justify a Court interfering in the Magistrate’s finding on credit.

There is also an issue of prejudice which has been raised on behalf of the respondent, and this is something I must also take into account. The witness for the complainant, Mr Montaldi, was clearly ill at the time of the trial and I understand is now at a stage where he is no longer working. There would be very severe prejudice to the respondent if, after all this time, it would be necessary for these matters to have to be relitigated and that is very relevant to the exercise of my discretion on the application to extend.

...

I have also been referred to a number of decisions which are set out in the submissions put forward on behalf of the respondent about the principles that apply in matters such as this. I accept that, in the genuine cases of fresh evidence, it may well be that the time does not have as much significance. But, as I have indicated, this is essentially a matter involving a finding of credit in a one-on-one situation where none of this proposed evidence, in my opinion, would have any real impact on the determination of the matter.”¹²

Relevant principles

- [13] In an application to extend time for a criminal appeal the court will examine whether there is any good reason shown to account for the delay and whether overall it is in the interests of justice to grant the extension.¹³ Whether or not it is in the interests of justice to grant the extension of time may involve some assessment of whether the appeal seems to be a viable one.¹⁴ The court will take into account the length of the delay, it being much easier to excuse a short than a long delay. Further, as *R v Lewis*¹⁵ shows, even where there is no satisfactory explanation for not bringing an appeal within time, the court should not refuse the application to extend time if the applicant is able to demonstrate that to refuse it would result in a miscarriage of justice.¹⁶

¹² Judgment of Harrison DCJ at 5-6.

¹³ *R v Tait* [1998] QCA 304 at [5].

¹⁴ *R v Tait* [1998] QCA 304 at [5]. See also *R v Banhelyi* [2011] QCA 268; *R v Smithers* [2013] QCA 90; *R v Mizzi* [2012] QCA 252.

¹⁵ [2006] QCA 121 at [3].

¹⁶ See also *R v Nuttall* [2013] QCA 219 at [19].

The applicant's submissions

- [14] Before this Court the applicant essentially repeated matters which had been raised before the learned primary judge. Nothing new was raised by way of criticism of the trial before the Magistrate. More importantly there was no attempt to demonstrate any error in the way in which the learned primary judge dealt with the matter. The applicant sought to adduce new evidence in the form of a WorkCover Queensland document dated 1 July 2008. It is a PAYG payment summary which reveals the period of work as a bus driver which was the subject of the original offence. The applicant sought to contend that the recording of the date as "19.06.2007 to present" was evidence that he had revealed his employment on 19 June 2007. It is nothing of the kind, as it simply records (in a document created a year after the event) the period of employment.
- [15] Two affidavits were filed to support the application for an extension of time. The first, dated 31 July 2013, sought to explain the delay in this way:
- (a) the applicant is not a lawyer – this is true;
 - (b) he was not armed with the relevant information, namely the "new" evidence;
 - (c) his previous lawyers withheld information from the courts – this was not supported by any credible facts;
 - (d) he was unaware that workplace safety legislation had been breached by WorkCover – this too was not supported by any credible fact;
 - (e) he was not told what forms to fill out for another appeal.
- [16] None of those explanations are sufficient. One feature of the hearing before the learned primary judge was that the necessity to bring an appeal in time was emphasised. The applicant could have been in no doubt at the end of that hearing that any step to take the matter further had to be taken in a timely way. The "new" evidence was not new; it was the same as that brought before the District Court.
- [17] The second affidavit, dated 14 August 2013, sought to outline the appeal grounds if leave were granted. Leaving aside those parts which consist of argumentative history, the balance consisted simply of an attempt to reargue why Mr Montaldi should have been disbelieved, and the applicant believed. As the learned primary judge observed, where findings of credit are involved in the resolution of factual questions leading to a conviction, that can be a considerable hurdle to the prospects of an appeal succeeding.
- [18] The affidavit then concludes with the assertion that the applicant gave the Crown three options which, slightly paraphrased, are as follows:
- (a) the acquittal of the applicant and the payment of compensation; the imposition of a fine on WorkCover to the extent of \$23,000,000 "FOR CRIMES THEY DID COMMIT"; and the imposition of a fine on the "CROWN" in the sum of \$23,000,000 "FOR AIDING AND ABETTING IN PERVERSION OF JUSTICE"; or
 - (b) if that did not happen, "THE CROWNS [sic] LAW MUST STAND ASIDE AND ALLOW AN INDEPENDENT [sic] PRESIDENT

TO STAND UNTIL [sic] QLD'S FIRST ELECTED INDEPENDENT [sic] PRESIDENT CAN LEAD US INTO NEXT CENTREY [sic]"; or

(c) "ALL THE ABOVE!".

Discussion

- [19] There is no adequate explanation for the delay involved between the decision of the learned primary judge on 21 May 2010, and the institution of these proceedings in July 2013. The explanation based on "new evidence" cannot be accepted; it was not new at all and was valueless in any event. Other assertions were not supported by admissible facts. The explanations are much the same as were proffered to the learned primary judge to try and explain the delay of 14 months between the time of conviction and the application in the District Court. Just as that explanation was rejected, so should the current explanations be rejected.
- [20] Acceptance of the applicant's explanations, or prospects on appeal, is not assisted by the flamboyant assertions in the second affidavit: see paragraph [18] above. They do not suggest a reasoned or rational approach to the issues.
- [21] As to the applicant's prospects of successfully appealing against the decision of the learned primary judge in the District Court, in my respectful opinion those prospects are non-existent. The learned primary judge dealt carefully with the questions of delay, the merits of any possible appeal, and the fact of prejudice because of the ill health of Mr Montaldi. Indeed, the prejudice that was identified by the learned primary judge has only intensified, in that Mr Montaldi is now deceased. The decision of the learned primary judge cannot be demonstrated to be an error in any respect. Leaving that aside, the applicant's only substantive grounds to challenge the conviction faces the considerable hurdle that detailed adverse findings of credit were made against him, and in favour of Mr Montaldi. Put simply, the applicant's contention that he revealed his employment to WorkCover was disbelieved. The applicant's prospects of success for appealing the original decision are also hopeless.
- [22] Given the matters above there is no reason to conclude that any miscarriage of justice will follow refusal to extend time.
- [23] After the hearing of the application was concluded the applicant filed a further affidavit with, yet again, further copies of documents he wished to rely on. It is not clear if it has been served on the respondent. However, they are too late and in any event do not assist to explain the delay or to enhance the merit of an attack on the outcome in the Magistrates Court. I would reject acceptance of the affidavit.

Disposition

- [24] In the circumstances outlined above the delay has not been satisfactorily explained, any appeal against conviction would be doomed to failure and its prospects would not be enhanced by the suggested new evidence. The application for an extension of time within which to appeal the conviction should be refused.

Orders

- [25] Orders:
1. The application for leave to adduce further evidence is refused.
 2. The application for an extension of time is refused.

- [26] **PHILIPPIDES J:** I agree that the application for leave to adduce further evidence and the application for an extension of time in which to appeal should be refused for the reasons stated by Morrison JA.